

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DEVIN D.,

Claimant,

OAH No. 2012051025

and

HARBOR REGIONAL CENTER,

Service Agency.

DECISION

Administrative Law Judge Deena Ghaly, Office of Administrative Hearings, State of California, heard this matter on July 2, 2012, at the Harbor Regional Center in Torrance, California.

S.D., claimant's mother, represented claimant.¹

Gigi Thompson, Manager, Rights Assurance, represented the Harbor Regional Center (HRC or Service Agency).

At the commencement of the hearing, Ms. Thompson requested that a correction to HRC's Hearing Position Paper (S.A. Exh. 1) be made, striking the sentence "The family continues to inform HRC that they do not wish to access their insurance." which appears at the end of the first paragraph on the last page of S.A. Exh.1. There was no objection to the request and it was granted.

Evidence was received and the matter submitted for decision on July 2, 2012.

ISSUE

Whether HRC will continue to fund two hours per week of Applied Behavioral Analysis (ABA) when private insurance may be available for funding the treatment.

¹ Initials are used to preserve confidentiality.

FACTUAL FINDINGS

I. Respondent's History

1. Claimant is a 10-year-old boy eligible for services under the The Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500, et seq.) due to his qualifying diagnosis of autism. Claimant resides with his mother and is enrolled in Riviera Elementary School in the Torrance School District where he attends a special day class.²

II. Services Funded by HRC

2. Claimant began receiving HRC-funded Applied Behavioral Analysis (ABA) services at a rate of 20 hours per week commencing in August 2003. In March 2005, his HRC-funded ABA services were reduced to 12 hours a week with an additional 15 hours provided by his school. Beginning in December 2009, Claimant's ABA services were further reduced to eight hours per week. Currently, he receives two hours per week of HRC-funded ABA services through service provider JBM Institute and additional ABA services funded by his school district.

III. Respondent's Needs for Services

3. On December 12, 2011, HRC Behaviorist Xerxes Orzame, MA, BCBA conducted an observation of Claimant and determined that a Functional Behavior Assessment (FBA) would be helpful in determining Claimant's current needs. At a subsequent meeting on February 3, 2012, the current service provider, JBA Institute, and S.D. agreed to the FBA.

4. Comprehensive Educational Service (ACES) administered the FBA which consisted of parent interviews, data collection, and assessor observations. Two areas of "behavior excess" were noted: outbursts with or without self-abusive behavior and "mouthing" (licking or placing inedible objects in one's mouth). Based on the results of the FBA, ACES provided its recommendations on April 19, 2012, which included continuing ABA services.

IV. Private Insurance Resources and Efforts to Access Private Insurance for Services

5. Claimant has insurance coverage from Anthem Blue Cross (Blue Cross) through his father's employer.

² Claimant's most recent Individual Education Plan (IEP) was prepared in March 2012. The resulting IEP was not produced at the hearing.

6. On or about July 15, 2011, Blue Cross came to an agreement with the California Department of Managed Care to provide behavioral services including ABA to its members with autism retroactive to June 1, 2011. Under the terms of the Agreement, Blue Cross agreed to provide ABA services based on members' current providers' recommendations through November 30, 2011. Thereafter, Blue Cross may conduct periodic reviews to determine the medical necessity of the services at a rate of no more than once per six month period.

7. On or about October 10, 2011, HRC personnel first discussed with S.D. accessing Blue Cross to pay for Claimant's ABA services. On January 26, 2012, HRC personnel made a follow-up call to S.D. regarding her progress in applying for ABA services through Claimant's private insurance. She reported not being successful in contacting Blue Cross. Claimant's HRC counselor, Carlos Velasco, offered to assist S.D. with drafting a letter to Blue Cross.

8. On April 25, 2012, through a letter from Mr. Velasco, HRC notified S.D. of its proposed action to end funding of Claimant's ABA services effective May 31, 2012, unless HRC received documentation reflecting Blue Cross's denial of ABA services. In his letter, Mr. Velasco reiterated his offer to help S.D. access services through private insurance. On May 10, 2012, HRC received a Fair Hearing Request from S.D. on Claimant's behalf. On the form, S.D. noted she was requesting a hearing to address HRC's "abrupt plans" to discontinue funding Claimant's ABA services.

9. On May 9, 2012, in the course of meetings to discuss Claimant's most recent Individual/Family Service Plan (IFSP), Mr. Valesco once again approached S.D. regarding accessing Claimant's insurance for behavioral services. During that meeting, he provided S.D. with copies of Blue Cross's agreement with the California Department of Managed Care and a copy of Senate Bill 946, a new law which requires all insurance companies to provide behavioral health treatments for individuals with autism and pervasive developmental disorder (See Legal Conclusion 9 *post*).

10. As of May 16, 2012, S.D. had not applied to Blue Cross for payment of Claimant's behavioral services. HRC extended its funding of ABA services through June 30, 2012.

11. At the hearing, S.D. credibly testified and provided some documentation supporting her assertion that she arranged to have Claimant's current service provider, JBM Institute, send a report regarding Claimant's needs for ABA services to Blue Cross. The documentation provided indicated that JBM Institute had sent the report on June 21, 2012.

12. On average, it takes five to six weeks for insurance companies to respond to requests to provide coverage for service such as those required by Claimant. The evidence in the record does not indicate whether JBM Institute's submission satisfies Blue Cross's requirements for obtaining coverage for ABA services.

13. S.D. had not applied for coverage through Blue Cross earlier because she felt discouraged over whether it would approve the services and because she was concerned about meeting the additional financial obligations she would incur for co-payments.

14. HRC Program Manager Doria Watson credibly testified that HRC would continue to fund necessary services if private insurance sources refused to provide coverage and that HRC considers funding for co-payments for those families whose financial circumstances make paying co-payments a hardship.

LEGAL CONCLUSIONS

1. The Lanterman Act mandates that an “array of services and supports should be established...to meet the needs and choices of each person with developmental disabilities... and to support their integration into the mainstream of life in the community.” (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620, et seq.) Regional centers are responsible for developing and implementing individual program plans for consumers, for taking into account individual consumer needs and preferences, and for ensuring that services and supports effectively meet the consumer’s goals in a cost effective manner. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

2. Services and supports for persons with developmental disabilities are defined as “specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic rehabilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.” (Welf. & Inst. Code, § 4512, subd. (b).)

3. The services and supports to be funded for a consumer is determined through the individual program plan process, which involves collaboration with the consumer and service agency representatives. (Welf. & Inst. Code, § 4512, subd. (b).) “The determination of which services and supports are necessary shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan and the cost-effectiveness of each option.” (*Ibid.*)

4. Generally, when purchasing services and supports, regional centers are required to ensure all the following:

- (1) Conformance with the regional center’s purchase of service policies
- (2) Utilization of generic services and supports when appropriate.

(3) Utilization of other services and sources of funding as contained in Section 4659.

(4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting.

(Welf. & Inst. Code, § 4646.4, subd. (a).)

5. Regional centers are required to "identify and pursue all possible sources of funding for consumers receiving regional center services." (Welf. & Inst. Code, § 4659, subd. (a).) "[R]egional centers shall not purchase any service that would otherwise be available from...private insurance or a health care service plan when a consumer or family meets the criteria of this coverage but chooses not to pursue that coverage." (*Ibid.*)

6. State Bill 946³ passed on October 9, 2011 and scheduled for implementation on July 1, 2012, states that every health care service plan shall provide coverage for behavioral health treatment for pervasive development disorder or autism. It defines behavioral health treatment as "professional services and treatment programs, including applied behavior analysis and evidence-based behavior intervention programs that develop or restore, to the maximum extent practicable, the functioning of an individual with pervasive developmental disorder or autism." (*Ibid.*)

7. Throughout all relevant periods, HRC made numerous, good faith efforts to educate, assist and support S.D. in applying for private insurance coverage. Contrary to S.D.'s assertion that HRC acted abruptly in discontinuing its funding of Claimant's ABA services, HRC did all it could to help Claimant transition to private insurance funding while maintaining its own obligations to act within the bounds of applicable law. Nonetheless, S.D., who is Claimant's primary parent, HRC's primary contact, and is generally responsible for making decisions on Claimant's behalf, chose to wait more than nine months before attempting to access private insurance coverage for Claimant's needs. The overall regulatory schema of the Lanterman Act as well as the specific provisions at issue call for a division of responsibilities between claimants or their families and the service agencies, in matters financial and nonfinancial alike. Under the circumstances of this case, HRC's determination to withdraw funding Claimant's ABA services must be upheld. (Factual Findings 7-11, and Legal Conclusions 4-6.)

³ Senate Bill 946 amends Health and Safety Code Section 121022, adds Health and Safety Code Section 1374.74, adds and repeals Health and Safety Code Section 1374.73, adds and repeals Insurance Code Sections 10144.51 and 10144.52, and amends Welfare and Institutions Code Sections 5705, 5708, 5710, 5724, and 5750.1.

ORDER

1. Claimant Devin D.'s appeal is denied.

Dated: July 13, 2012

DEENA GHALY
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. This decision binds both parties. Either party may appeal this decision to a court of competent jurisdiction within 90 days.